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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 280

KENNETH ADAMS TOLLIVER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth District entered against the above petitioner, in a case in the United States Court of Appeals for the Sixth District entitled United States of America, plaintiff, vs. Kenneth Adams Tolliver, defendant, No. 15,216, decided on June 20, 1963.

OPINIONS BELOW.

The United States Court of Appeals for the Sixth Circuit did not render a written opinion. However, the court in the District Court of the United States for the Northern District of Ohio, Eastern Division, rendered a written memorandum in case No. CR 62-160 which can be found in Appendix A hereto.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 20, 1963, a copy of the judgment of that court is attached hereto and marked Appendix "B."

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTIONS PRESENTED.

Was the petitioner denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by the circumstances that he was convicted of a felony under a Federal Statute when:

1. The elements in the indictment were not proved.

2. The District Court refused to grant a motion for a Bill of Particulars.

3. In the indictment it was charged *both* that he "* * * knowingly transported * * *" and "* * * caused to be transported * * *" a certain female in violation of Title 18, United States Code, while the Court found only one of these two elements, namely, that he "* * * caused to be transported * * *" a certain female in violation of Title 18, United States Code.

4. All of the elements necessary to prove that the defendant violated the above mentioned section were not proved by the degree of proof required under law, namely, beyond reasonable doubt.

5. The decision in the instant case is in direct conflict with the decisions in *Mortensen vs. United States*, 322 U. S. 369 (1944) and *Hanson vs. Haff*, 291 U. S. 559.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

Constitution of the United States, Amendment No. 14, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or the immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 18, U. S. C., section 2421:

"*Transportation generally.*

> "Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or
>
> Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory, or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person, to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or

in the District of Columbia or any Territory or Possession of the United States—

Shall be fined not more than $5,000 or imprisoned not more than five years or both."

STATEMENT OF THE CASE.

Inasmuch as the testimony of Lydia Mistchenko, the prosecutrix, who was the chief witness for the government and the testimony of the appellant, Tolliver, were conflicting, the testimony of both is summarized in this statement of fact.

The appellant, Kenneth Tolliver, is a man of 29 years of age and a resident of Cleveland, Ohio. In September 1960, the appellant and Roger Williams decided to take a short vacation in New York City for four or five days or about a week. They travelled to New York in a 1955 two-tone Cadillac automobile owned by Roger Williams. Arriving in New York, they went to the Whitehall Hotel. The appellant stayed at the Whitehall Hotel at the apartment of persons referred to in the testimony as Bobby and his wife. Williams resided elsewhere. After a few days, appellant met the prosecutrix Mistchenko at Bobby's apartment.

The appellant testified that the prosecutrix was visiting Bobby's wife. The appellant contends that the prosecutrix asked him how things were in Cleveland after having informed him that she was a prostitute, and further informing him how good business was in New York.

Appellant claims he informed her that he didn't have any leads for her in Cleveland, and she then told him she thought she would take a vacation in Cleveland and look around. Appellant claims she asked him whether he could make it possible for her to ride back with Roger Williams and himself. At the time she first posed the question, the appellant claimed he wasn't sure. Later, arrangements

were made after Roger Williams asserted that it was all right with him, if she travelled back to Cleveland with Tolliver and himself. Tolliver helped Mistchenko load her baggage into Roger Williams' automobile immediately prior to embarking to Cleveland.

The prosecutrix testified that Tolliver asked her to go back to Cleveland with him. She testified that he could arrange for her to make more money in Cleveland, since he had connections for her. The prosecutrix testified that although she was making up to Five Hundred Dollars ($500.00) per week in her chosen trade and was able to keep the entire gross amount for herself, she was willing to go to Cleveland with the appellant. The prosecutrix had never been to Cleveland before. She claims that the appellant convinced her she could make more money in Cleveland, yet she never discussed with the appellant the money she was making in New York.

She testified that on coming to Cleveland she expected to turn her entire earnings over to the appellant in exchange for food, shelter, clothing and other monies which he would see fit to turn over to her.

She admitted that no definite arrangements as to any of these alleged business transactions had been formulated in New York.

Whereas, the prosecutrix specifically denies that her purpose in coming to Cleveland was for a vacation, the appellant expressly asserts that his understanding of the purpose of her visit was merely a short vacation, so that she might make up her mind whether or not to move to Cleveland permanently in the future.

The testimony is undisputed that although the prosecutrix took clothes with her on the journey, she abandoned her furniture. The prosecutrix testified that she had no idea as to where this abandoned furniture was at the

time of trial. The prosecutrix further testified that her rent for the apartment in New York City did not expire until the 15th day of September, and that the trip to Cleveland was completed on the 11th or 12th of September.

There is conflicting evidence as to who actually drove the car from New York City to Ohio. The prosecutrix testified that Williams drove the car to New Jersey, and that the appellant drove the car from a point in or near Newark, New Jersey for the rest of the trip to Cleveland. The appellant testified that Roger Williams was the driver during the entire trip.

The prosecutrix was the only witness for the government providing the evidence that it was Tolliver's idea and persuasion which caused her to come to Cleveland to engage in prostitution, and that her purpose in coming to Cleveland was not that of a vacation.

The prosecutrix is a Russian citizen who is subject to deportation for her activities as a prostitute. She expressly denied that the Federal agents expressly implied the threat of deportation in order to make her testify.

The appellant testified that the Federal Agents insisted that she came to Cleveland for the purpose of prostitution and giving the appellant money. The appellant testified that the prosecutrix said to him that although she moved again and again, the Federal Agents rediscovered her and reasserted the same questions.

The appellant consistently denied that he brought the prosecutrix to Cleveland for any purpose other than to accommodate her wish for a vacation in Cleveland.

The evidence showed that at all times the petitioner was only interested in providing accommodation for Lydia Mistchenko to vacation in Cleveland, Ohio.

In spite of these facts, the petitioner was convicted and sentenced to five years in the Federal Prison. The peti-

tioner was sentenced to five years by the United States District Court, which sentence was confirmed by the United States Court of Appeals for the Sixth Circuit.

It is the contention of the defendant that he was wrongfully found guilty and sentenced to the penitentiary.

REASONS FOR GRANTING THE WRIT.

We charge

1. The evidence shows that the petitioner did not go to New York for the purpose of inducing Lydia Mistchenko to return to Cleveland for the purpose of prostitution. There was no basis for a conviction since the indictment had both elements as a basis for the charge. A conviction on only part of the elements of the charge violates due process.

2. This Court, in the case of *Mortensen vs. United States*, 322 U. S. 369 (1944) at page 374 stated as follows:

> "To constitute a violation of the Act, it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities. *Hansen v. Haff*, 291 U. S. 559, 563. An intention that the women or girls shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. *Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.*" (Emphasis ours.)

The decision in the instant case is in direct conflict with *Mortensen vs. United States* and *Hansen v. Haff, supra.*

CONCLUSION.

This cause illustrates the very evil the jurisdiction of the Supreme Court of the United States was designed to remedy; namely where circumstances exist under which a defendant who has committed no crime or one not proved to be committed as was charged in the indictment, was found guilty by a court without a jury and denied his liberties. It is the petitioner's contention that the United States has acted without due process of law.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RALPH A. MCALLISTER,
Attorney for Petitioner.

TERRELL, WILLIAMS AND SALIM,
SEYMOUR A. TERRELL,
Of Counsel.

APPENDIX A.

Memorandum of Opinion, United States District Court, Northern District of Ohio, Eastern Division, Case No. Cr. 62-160.

BATTISTI, *J.*: Gentlemen, it seems clear from the evidence that Miss Mistchenko was a prostitute in the State of New York in New York City.

It is clear that she met with the Defendant Tolliver, and presumably another person named Williams, Roger Williams. It is significant that it ultimately developed that Tolliver paid for the room which he claims was to be occupied by Williams. These persons had about three meetings in New York.

Miss Mistchenko believed the Defendant to be one who obtains girls for employment in prostitution, accepts the proceeds from their activities, provides them food and lodging and some share of those proceeds. She believed him to be in that business. And it also seems clear, from the testimony, that he believed, and in fact knew when he met her, that she was a prostitute. Thus, this case does not present the situation where a man meets a woman whom he doesn't know is engaged in that sort of business and they drive off together and happen to cross the state line. Here we are dealing with a known prostitute and one who employs them.

They agreed that she would be transported from New York to Cleveland by automobile. Now, whether he operated the automobile is not pertinent because the statute speaks in terms of causing to be transported.

It appears to be quite clear from the payment of the bills and the testimony elicited, that Tolliver was in control of the situation and arrangements that were made in New York; and that Tolliver with the consent of Miss

Mistchenko caused her to be transported from New York to Cleveland.

They did travel to Cleveland. On arriving here they went immediately to a place where Tolliver stays at 115th and Superior. They went to an apartment which he rented and she took up residence in that apartment. Also living in that apartment was Patricia Pressley who admitted that she was a prostitute. It is clear from the testimony both of the Defendant and Pressley that Mistchenko and Tolliver knew that Pressley was a prostitute; that she earned funds in connection with that activity; that she turned some of the earnings over to the Defendant Tolliver and that he provided her with food and lodging.

While little if any of what the Defendant has testified to has in any way been corroborated in this trial, a great deal of the material facts necessary to prove the essential elements of the charge contained in this Indictment have been corroborated by the testimony of Pressley and Mistchenko.

Intent, of course, must be proved. But obviously intent must be proved and can only be proved—unless there is an admission of intention on the part of all parties, and that rarely ever occurs—by the facts and circumstances surrounding the case. Well, when I consider the three meetings in New York, the manner in which they met and where, the knowledge that they had of one another and one another's business, and all of the other circumstances in the case, it seems to establish beyond a reasonable doubt that when Tolliver agreed to travel across the state line with Mistchenko that it was for the purpose of inducing her to engage in prostitution for profit, both for himself and herself when they reached Cleveland.

As I have indicated the payment of the room which Tolliver claims he obtained for Williams is significant and

is one of the facts which leads me to believe that he was definitely in control of the situation in New York.

Therefore I find by the required degree of proof, beyond a reasonable doubt, that on or about September 12, 1960, the defendant, Kenneth Adams Tolliver, knowingly and willfully caused to be transported in interstate commerce from New York to Cleveland, Ohio, in the Northern District of Ohio, Eastern Division, Lydia Mistchenko for the purpose of prostitution and with intention to induce her to engage in prostitution in violation of Title 18, Section 2421 of the United States Code, and the Defendant therefore is found guilty.

APPENDIX B.

Order of the United States Court of Appeals for the Sixth Circuit.

(Caption omitted.)

Before O'SULLIVAN, Circuit Judge, WILSON and FOX, District Judges.

THIS CAUSE having come on to be heard upon the record, briefs and appendices, and upon the arguments of counsel, and upon due consideration thereof,

IT IS ORDERED that the judgment of the District Court be, and it is, hereby affirmed.

Approved for entry.

/s/ CLIFFORD O'SULLIVAN,
U. S. Circuit Judge.

Filed June 20, 1963
Carl W. Reuss, Clerk.

APPENDIX C.

Indictment, District Court No. Cr. 62,160.

(Caption omitted.)

The Grand Jury charges:

On or about September 12, 1960, Kenneth Adams Tolliver knowingly transported and wilfully caused to be transported in interstate commerce from New York, New York to Cleveland, Ohio, in the Northern District of Ohio, Eastern Division, a certain female, Lydia Mistchenko, for the purpose of prostitution, debauchery and other immoral purposes, and with intent to induce, entice, and compel said Lydia Mistchenko to engage in prostitution, debauchery, and other immoral practices; in violation of Title 18, Section 2421, United States Code.

A TRUE BILL.

Foreman.

United States Attorney.

APPENDIX D.

Judgment and Commitment.

(No. Cr. 62.160—Caption omitted.)

On the 23 day of October, 1962 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon a finding of guilty by the court of the offense of having transported in interstate commerce a person for the purpose of immoral practices, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 5 (five) years.

IT IS FURTHER ORDERED that the bond on appeal is hereby fixed in the sum of $10,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officers and that the copy serve as the commitment of the defendant.

/s/ FRANK J. BATTISTI,
United States District Judge.

The Court recommends commitment to:

_____
Clerk

(Certification omitted.)

APPENDIX E.

Request for Bill of Particulars.

(Cr. No. 62,160—Caption omitted.)

Now comes the defendant, by his attorney, Seymour A. Terrell, and moves this Honorable Court for an order requiring the United States Government to grant to the defendant a Bill of Particulars specifically setting forth the following items:

1. From what address in New York City, New York, was Lydia Mistchenko transported to Cleveland, Ohio.

2. The address in Cleveland, Ohio to which Lydia Mistchenko was transported.

3. The method of transportation.

4. The ownership of the conveyance.

5. Who paid for the cost of transportation.

6. Where Lydia Mistchenko performed acts of prostitution, debauchery or other immoral practices, and the dates and places these acts allegedly took place.

7. With whom the alleged acts took place.

It is necessary that the foregoing questions be answered in order that the defendant herein may properly prepare his defense.

TERRELL, WILLIAMS AND SALIM,

Attorneys for Kenneth Adams Tolliver.

(Service omitted.)

APPENDIX F.

Questions of the Court Appearing on pages 87, 88, 89, of the Transcript of the Trial Proceedings, Testimony of Lydia Mistchenko.

The Court: *And what else did he say about what would happen in Cleveland if anything? For example, did you make any arrangements, did you arrive at any agreement?*

The Witness: So far as working in Cleveland?

The Court: Yes.

The Witness: *Not at that time, no.*

The Court: Did you at any time?

The Witness: Well, he told me about that he knew some very good night clubs that I could be very successful in making money.

The Court: Well, how?

The Witness: Prostituting.

The Court: On your own, so to speak?

The Witness: What do you mean "on my own"?

The Court: Well, what was your arrangement? What arrangement did you make, if any, with the Defendant? Did you talk over an arrangement?

The Witness: The arrangement was to work for him.

The Court: *Did you talk over the basis of the deal, so to speak?*

The Witness: *Well, we didn't speak of how much money I would keep or how much money he would take.*

The Court: *You did not arrive at any understanding with him as to how much money would be involved for you, for example, and how much would be involved for him?*

The Witness: No.

The Court: Well, was anything said which perhaps may not have been agreed upon but *at least suggested in that respect?*

The Witness: *No.*